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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 20/2018 concerning William Yekrop (Australia)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 22 December 2017 the Working Group transmitted to the Government of Australia a communication concerning William Yekrop. The Government replied to the communication on 21 February 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

* In accordance with paragraph 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. William Yekrop, born in 1984, is a Dinka man from South Sudan (as it is now known). He usually resides at the Christmas Island Immigration Detention Centre, Australia.

Background

5. The source reports that Mr. Yekrop's early life in the Sudan and in an Egyptian refugee camp was marked by hardship, violence and tragedy. He grew up in the Sudan during the second Sudanese civil war between the Government of the Sudan and the Sudan People's Liberation Army, which was reportedly one of the longest and bloodiest civil wars ever recorded. Approximately 2 million people died during that war and approximately 4 million people were displaced. In addition, it was reportedly marked by gross human rights violations, including the use of child soldiers, amputation of limbs and sexual slavery.

6. The source indicates that Mr. Yekrop's father served with the Sudan People's Liberation Army as a soldier. Mr. Yekrop was approximately 5 years old when his father was killed. Before and after his father's death, he experienced extreme violence, including being trained as a child soldier and witnessing many deaths. According to the source, Mr. Yekrop's family was forced to flee the Sudan when his older brother turned 18 years old and was in danger of being conscripted by the Sudanese military, which fought against the Sudan People's Liberation Army. If Mr. Yekrop's brother had been conscripted, he would have been forced to fight against his own people and family, and his dead father's fellow soldiers. As a result, Mr. Yekrop and his family fled from the Sudan to an Egyptian refugee camp.

7. According to the source, Mr. Yekrop remembers feeling scared and in danger for the three years his family lived in the refugee camp in Egypt. As there was limited humanitarian assistance available at this camp, both Mr. Yekrop and his brother worked to support the family.

8. The source reports that on 22 August 2003, Mr. Yekrop, his mother and his siblings were granted humanitarian visas. On 10 October 2003, Mr. Yekrop and his family arrived in Australia, when he was approximately 16 years old. In granting Mr. Yekrop a humanitarian visa, the Government of Australia recognized his refugee status and the fact that any return to South Sudan would constitute refoulement.

9. The source reports that when Mr. Yekrop and his family arrived in Australia, he was excited about his new life and had plans for his future. He wanted to learn English, get educated and work. He reportedly commenced intensive English classes and completed year 12. On arrival in Australia, it was the first time in Mr. Yekrop's life that he had felt safe. He felt that he could relax for the first time and would no longer have to be afraid and cautious all the time.

10. However, although Mr. Yekrop was finally physically safe in Australia, his underlying psychological issues were not addressed. On arrival in Australia, he received no counselling or other support to deal with his traumatic past.

11. Within six months of arriving in Australia, Mr. Yekrop reportedly began self-medicating with drugs and alcohol,[1] and on 25 April 2004, he was convicted of low-level property damage. Thereafter, he was convicted of numerous offences relating to property damage, drink-driving, dangerous driving, violence and miscellaneous other offences. The

[1] The source refers to several reports that illustrate the problems experienced by refugees from South Sudan in settling into their new lives in a safe environment. These problems include alcohol and other substance abuse and mental health issues. These factors reportedly apply to Mr. Yekrop.

source notes that Mr. Yekrop was convicted of a number of offences while he was still a minor. He has reportedly served prison sentences as a result of these convictions.

12. According to the source, on 9 August 2011, Mr. Yekrop received notice of the intention of the Department of Immigration and Border Protection to consider cancellation of his global special humanitarian (subclass 202) visa. The Department cancelled Mr. Yekrop's visa on 24 May 2013, owing to concerns about his character, but giving him the right to apply for revocation of cancellation. The source indicates that under section 501 of the Australian Migration Act 1958, the Minister of Immigration and Border Protection may cancel a person's visa if the Minister believes that the person does not meet the character requirements as set out in that section. Due to Mr. Yekrop's criminal history, the Minister determined that he did not meet such character requirements.

13. The source reports that on 22 January 2014, following the cancellation of his humanitarian visa, Mr. Yekrop applied for a protection (class XA) visa.

Arrest and detention

14. According to the source, on 1 May 2014, Mr. Yekrop was detained by officials from the Department of Immigration and Border Protection, following the completion of his last prison sentence upon his release from prison. He was initially administratively detained at Villawood Immigration Detention Centre and he has since been moved to Christmas Island Immigration Detention Centre, where he remains to date.

15. On 31 May 2014, Mr. Yekrop's protection visa application of 22 January 2014 was refused by the Department of Immigration and Border Protection. He appealed the refusal before the Refugee Review Tribunal. On 30 September 2014, the Tribunal remitted the refusal to the Department, with the recommendation that Mr. Yekrop met the definition of a refugee as a member of a particular social group (returnees and people with mental health disorders). On 23 October 2014, the cancellation of Mr. Yekrop's humanitarian visa was confirmed.

16. On 3 February 2015, the Department of Immigration and Border Protection sent notice of the intention to consider refusal of a protection visa. On 5 August 2016, the Minister again refused to grant Mr. Yekrop a protection (class XA) visa, due to character concerns. On 15 August 2016, Mr. Yekrop appealed that second rejection of his protection visa application to the Administrative Appeals Tribunal, and on 31 October 2016, the Tribunal upheld the Minister's decision not to grant Mr. Yekrop a protection visa. On 17 August 2016, the Full Federal Court of Australia upheld the cancellation of Mr. Yekrop's humanitarian visa.

17. The source indicates that Mr. Yekrop is being detained on the basis of the Australian Migration Act 1958. The Act specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. In addition, section 196 (3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention, unless the person has been granted a visa.

18. According to the source, Australian law thus provides that a non-citizen can be released from administrative detention only if they are removed from Australia or granted a visa. However, the source notes that Mr. Yekrop is not eligible to apply for any other type of visa.

19. The source also notes that given that Mr. Yekrop has previously been recognized as a refugee by the Department of Immigration and Border Protection, and given the current emergency situation in South Sudan, he cannot be removed from Australia without it constituting refoulement. Furthermore, as noted above, both the Department and the Minister have refused to grant Mr. Yekrop a visa.

20. The source further notes that it is unclear whether South Sudan would accept Mr. Yekrop as a citizen. He left the Sudan before South Sudan was an independent country. South Sudan would reportedly first have to grant Mr. Yekrop citizenship before he could be returned to the country. Given the current humanitarian crisis in South Sudan, it is unlikely that South Sudan would process such a citizenship request, particularly if the request would

result in the return of a person to South Sudan and thus place further pressure on the already strained resources of that country.

21. In addition, the source notes that it is unlikely, given that Mr. Yekrop is a Dinka man and the son of a Sudan People's Liberation Army soldier that the Sudan would accept him back. According to the source, it is thus extremely unlikely that Mr. Yekrop could be returned to the Sudan or South Sudan.

Analysis of violations

22. The source asserts that Mr. Yekrop's detention constitutes an arbitrary deprivation of his liberty under categories II, III, IV and V of the categories applicable to the consideration of cases by the Working Group.

Category II

23. The source submits that Mr. Yekrop has been deprived of liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights, whereby everyone has the right to seek and to enjoy in other countries asylum from persecution. Mr. Yekrop came to Australia as a refugee in exercise of his right to seek and enjoy asylum. Had he not travelled to Australia to seek asylum, Mr. Yekrop would not currently be detained.

24. According to the source, Mr. Yekrop has also been deprived of his liberty in contravention of article 26 of the International Covenant on Civil and Political Rights. As a non-Australian citizen, Mr. Yekrop is subject to administrative detention, whereas Australian citizens in the same position as Mr. Yekrop, namely those who have served custodial sentences, are not subject to administrative detention following the completion of their criminal sentence.

Category III

25. The source submits that the international norms relating to the right to a fair trial have not been observed in relation to Mr. Yekrop's detention, specifically the rights protected under articles 9 and 10 of the Universal Declaration of Human Rights and article 9 of the Covenant.

26. The source notes that the Human Rights Committee, in its general comment No. 35 (2014) on liberty and security of person, requires that detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time (para. 18).

27. Nevertheless, the source highlights the fact that Mr. Yekrop has been held in administrative detention for more than three years. The Government of Australia and the Department of Immigration and Border Protection, by granting Mr. Yekrop a humanitarian visa, recognized him as a person who engages the country's protection obligations. South Sudan is currently experiencing a period of humanitarian emergency. As such, even if he was a citizen of South Sudan (which he is not), any return of Mr. Yekrop to South Sudan would constitute refoulement.

28. The source thus submits that unless Mr. Yekrop is released from administrative detention, he will be in detention indefinitely. Given that he cannot return to South Sudan, his detention is not reasonable. Furthermore, he has reportedly participated in a variety of rehabilitation and counselling programmes. The source thus argues that Mr. Yekrop no longer represents a threat to the Australian community, and his detention is not necessary or proportionate. According to the source, there is no evidence that the Department of Immigration and Border Protection has reassessed Mr. Yekrop's detention as it extends in time.

Category IV

29. The source submits that Mr. Yekrop, as a recognized refugee who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy.

30. As mentioned above (see para. 17), the Australian Migration Act 1958 specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. Section 196 (3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention, unless the person has been granted a visa.

31. In this regard, the source notes that the High Court of Australia, in its 2004 decision on *Al-Kateb v. Godwin*, upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia. The source also notes that, in its decision in *Mr. C. v. Australia*, the Human Rights Committee held that there is no effective remedy for people subject to mandatory detention in Australia (see CCPR/C/76/D/900/1999, para. 7.4). The source submits that Mr. Yekrop therefore lacks any chance of his detention being the subject of a real administrative or judicial review remedy.

Category V

32. According to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in *Al-Kateb v. Godwin* is that while Australian citizens can challenge administrative detention, non-citizens cannot.

Response from the Government

33. On 22 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 21 February 2018, detailed information about the current situation of Mr. Yekrop and any comments on the source's allegations.

34. In its reply of 21 February 2018, the Government of Australia reiterated that it takes its protection obligations very seriously, and its protection arrangements are premised on the fundamental obligation of non-refoulement.

35. In relation to the specific case, the Government confirms that Mr. Yekrop arrived in Australia on 10 October 2003 as the holder of a global special humanitarian visa (subclass 202) as a dependant on his mother's visa. The Government notes that since his arrival, Mr. Yekrop has received over 40 convictions for a range of offences, including destroying or damaging property, drink-driving, driving vehicles without a licence, larceny and common assault.

36. It was due to Mr. Yekrop's criminal convictions that the Department of Home Affairs considered cancelling his visa on two separate occasions. On 31 May 2007 and 12 January 2010, Mr. Yekrop was advised that his visa would not be cancelled and he was issued with a warning letter on both occasions, indicating that any future criminal conduct could result in his visa being cancelled.

37. Following further criminal convictions, Mr. Yekrop's visa was indeed cancelled on 8 November 2012 under section 501 of the Australian Migration Act. On 6 May 2013, Mr. Yekrop sought review of the decision to cancel his visa at the Administrative Appeals Tribunal, but since this application was lodged outside the required time frame, the Tribunal found that it had no jurisdiction to review the decision. As Mr. Yekrop was released from prison on 1 May 2014, he was detained under section 189 of the Act and transferred to an immigration detention facility. He has remained in immigration detention since then.

38. On 22 January 2014, Mr. Yekrop lodged a protection visa (subclass 866) application. On 31 May 2014, he was found not to engage the protection obligations of Australia, and the Department of Home Affairs refused his protection visa application. Further to this, Mr. Yekrop sought review of the refusal decision at the Refugee Review Tribunal on 4 July 2014, and on 1 October 2014, the Tribunal remitted the case to the Department of Home Affairs with the direction that Mr. Yekrop was found to engage the protection obligations of Australia.

39. On 3 July 2014, Mr. Yekrop lodged an application for a bridging visa (subclass 050), which was deemed invalid on 7 July 2014 since he had previously had a visa cancelled under section 501 of the Australian Migration Act.

40. According to the Government, on 8 October 2014, Mr. Yekrop's protection visa application was referred for refusal consideration under section 501 of the Act and he was issued with a notice of intent to consider refusal on 3 February 2015. Following consideration of Mr. Yekrop's case, the Department of Home Affairs refused his protection visa application under section 501 of the Act on 5 August 2016. On 15 August 2016, Mr. Yekrop sought review of the decision to refuse his protection visa application at the Administrative Appeals Tribunal, which affirmed the decision on 31 October 2016.

41. On 28 February 2017, the Department of Home Affairs commenced an assessment of Mr. Yekrop's case against the section 195A ministerial intervention guidelines for possible referral to the Minister. On 24 October 2017, his case was found not to meet the guidelines for referral due to his criminal history, a visa cancelled under section 501 of the Australian Migration Act and another visa refused under section 501 of the Act. On the same day, the Department of Home Affairs commenced an International Treaties Obligations Assessment to consider the ongoing non-refoulement obligations of Australia in relation to Mr. Yekrop, which is still under way.

42. The Government confirms that Mr. Yekrop is not eligible to apply for any other type of visa and that he remains in detention as an unlawful non-citizen. The Government objects to the submission that Mr. Yekrop has not been granted the possibility of administrative or judicial review or remedy and notes that he was able to seek merit and judicial review of the decision to cancel his global special humanitarian visa (subclass 202) and to refuse his protection visa application. While Mr. Yekrop did seek this in relation to his global special humanitarian visa, he did so outside the prescribed time limit. His application to review the decision to refuse his protection visa was unsuccessful. The Government, however, points out that Mr. Yekrop did not seek judicial review of either of those decisions, which he could have done before the Federal Court of the High Court of Australia.

43. The Government also rejects the submissions made by the source in relation to the effect of the 2004 decision of the High Court in *Al-Kateb v. Godwin* and points out that actions such as habeas corpus remain available to all citizens and non-citizens.

44. Furthermore, the Government underlines that Mr. Yekrop's detention has been reviewed on 37 occasions under case management processes by the Case Management and Detention Review Committee meetings. The outcomes of those reviews found that Mr. Yekrop's detention continues to be appropriate and that his current placement is suitable.

Further information from the source

45. On 21 February 2018, the reply of the Government was sent to the source for its comments. In its response of 6 March 2018, the source rejects the possibility of habeas corpus in the case of Mr. Yekrop. Noting that Mr. Yekrop arrived in Australia on the basis of a visa which was subsequently withdrawn, Mr. Yekrop's detention complies with the national legislation of Australia, which thus renders a habeas corpus application useless as it applies to alleged instances of unlawful detention.

46. The source points out that, according to its Smart Traveller website, the Government of Australia is advising that no one should travel to South Sudan.[2] The source also refers to the most recent Administrative Appeals Tribunal decision of 6 March 2018 in relation to South Sudan, in which the Tribunal decided that South Sudan was unsafe for anyone to return to.[3]

[2] http://smartraveller.gov.au/Countries/africa/east/Pages/south_sudan.aspx.

[3] See Jayba and Minister for Immigration and Border Protection (Migration) [2018] AATA 385, Administrative Appeals Tribunal of Australia, 6 March 2018.

47. The source agrees with the Government's point that Mr. Yekrop has been able to seek merits and judicial review of the decisions to cancel his visa and to refuse his protection visa application. However, according to the source, those reviews relate to visa processes, and not to the detention itself. The source reiterates that Mr. Yekrop's detention is legal in Australia, but it is nevertheless arbitrary, especially as it extends in time.

Discussion

48. The Working Group thanks both the source and the Government for their engagement in this case and for the extensive comments provided, which have assisted it in reaching its conclusions.

49. The source has submitted that Mr. Yekrop's detention is arbitrary and falls under categories II, III, IV and V. While not addressing the categories as applied by the Working Group specifically, the Government of Australia rejects those submissions. The Working Group has examined them in turn.

50. The source submits that Mr. Yekrop has been deprived of liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights, whereby everyone has the right to seek and to enjoy in other countries asylum from persecution. Mr. Yekrop came to Australia as a refugee in exercise of his right to seek and enjoy asylum and had he not travelled to Australia to seek asylum, Mr. Yekrop would not currently be detained.

51. The Working Group observes that Mr. Yekrop arrived in Australia on 10 October 2003 as the holder of a global special humanitarian visa (subclass 202) as a dependant on his mother's visa and that he has lived in Australia ever since. The Working Group also observes that he received this particular visa following an assessment that his case engages the international protection responsibility of Australia; and that upon his arrival he was not detained but was free to live in the community. These are all points which are not contested by either the source or the Government.

52. The Working Group notes that since his arrival in Australia, Mr. Yekrop has had some 40 criminal convictions and that due to his criminal convictions, the Department of Home Affairs considered cancelling his visa on two separate occasions. On 31 May 2007 and 12 January 2010, Mr. Yekrop was advised that his visa would be cancelled and he was issued with a warning letter on both occasions, indicating that any future criminal conduct could result in his visa being cancelled. Following further criminal convictions, Mr. Yekrop's visa was indeed cancelled on 8 November 2012 under section 501 of the 1958 Australian Migration Act. Mr. Yekrop was placed in administrative detention upon being released from prison on 1 May 2014 and has been in immigration detention ever since. These are also points which are not contested by either the source or the Government.

53. The Working Group observes that the cancellation of Mr. Yekrop's visa resulted from an adverse character assessment, which in turn resulted from the sheer number of criminal convictions. The cancellation of his visa was the reason why he was detained as an unlawful non-citizen. On the basis of these facts, the Working Group is unable to agree with the source that Mr. Yekrop's detention resulted from his legitimate exercise of the right to seek asylum as provided in article 14 of the Universal Declaration of Human Rights. On the contrary, it is clear to the Working Group that Mr. Yekrop was able to exercise his right to seek asylum: he arrived in Australia and was permitted to live as freely as everyone else in the country until he came into conflict with law. The Working Group therefore concludes that the detention of Mr. Yekrop does not fall under category II.

54. The source has also submitted that the international norms relating to the right to a fair trial have not been observed in relation to Mr. Yekrop's detention and that his detention therefore falls under category III. The source notes that Mr. Yekrop has been held in administrative detention for more than three years. The source argues that Mr. Yekrop no longer represents a threat to the Australian community, and his detention is not necessary or proportionate. According to the source, there is no evidence that the Department of Immigration and Border Protection has reassessed Mr. Yekrop's detention as it extends in time.

55. The source also argues that Mr. Yekrop's detention is arbitrary and falls under category IV since, as a recognized refugee who is subject to prolonged administrative custody, he has not been guaranteed the possibility of administrative or judicial review or remedy. The source notes that the Australian Migration Act 1958 specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. Section 196 (3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention, unless the person has been granted a visa.

56. In this regard, the source notes that the High Court of Australia, in its decision on *Al-Kateb v. Godwin*, upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia. The source also notes that, in its decision in *Mr. C. v. Australia*, the Human Rights Committee held that there is no effective remedy for people subject to mandatory detention in Australia, and that Mr. Yekrop therefore lacks any chance of his detention being the subject of a real administrative or judicial review remedy.

57. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[4] This right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty,[5] and it applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities and migration detention.[6] Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[7]

58. The Working Group observes that the facts of Mr. Yekrop's case as presented to it by both the source and the Government are characterized by various appearances by him before courts, pursuing his visa applications and challenging their rejection. However, none of these appearances have concerned his need to remain in detention while his visa applications are being considered and no judicial body has ever been involved in the assessment of the legality of Mr. Yekrop's detention, which would necessarily involve the assessment of the legitimacy, need and proportionality to detain.[8]

59. In other words, throughout his four years of detention, Mr. Yekrop has been unable to challenge the legality of his detention per se. The only body that appears to have been reviewing the need for Mr. Yekrop to remain in detention is the Case Management and Detention Review Committee. However, the Working Group observes that this is not a judicial body. Moreover, the Working Group observes the failure on behalf of the Government to explain how the reviews carried out by that Committee have satisfied the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the Covenant.

60. The Working Group also recalls the numerous findings by the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[9]

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[4] See A/HRC/30/37, paras. 2–3.

[5] Ibid., para. 11.

[6] Ibid., annex, para. 47 (a).

[7] Ibid., annex, para. 47 (b).

[8] See the Working Group's revised deliberation No. 5 on deprivation of liberty of migrants, paras. 12–13.

[9] See *Mr. C. v. Australia*; *Baban and Baban v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPk/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004); *Bakhtiyari et al. v. Australia*

61. In addition, as the Working Group stated in its revised deliberation No. 5 on deprivation of liberty of migrants, detention in the migration setting must be exceptional and in order to ensure this, alternatives to detention must be sought.[10] The Working Group notes that the Government has not provided any details on the alternatives to detention that the Case Management and Detention Review Committee or any other body have considered in the case of Mr. Yekrop and therefore must conclude that these were not considered, which is a further breach of article 9 (1) of the Covenant.

62. The Working Group thus concludes that Mr. Yekrop has been denied the right to challenge the continued legality of his detention in breach of article 9 of the Covenant and that his detention is therefore arbitrary, falling under category IV and not category III as submitted by the source.

63. The source has further submitted that the detention of Mr. Yekrop falls under category V since Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in *Al-Kateb v. Godwin* is that while Australian citizens can challenge administrative detention, non-citizens cannot. The Government rejects this submission made by the source and points out that actions such as habeas corpus remain available to all citizens and non-citizens.

64. The Working Group is surprised by the Government's submission that actions such as habeas corpus are a possible avenue of redress for Mr. Yekrop. It is clear to the Working Group that the current Australian legislation does permit the detention of Mr. Yekrop and therefore the habeas corpus challenge, which is aimed at challenging illegal detention, does not provide a realistic avenue of redress for people in Mr. Yekrop's situation. However, the Working Group recalls that just because a detention is carried out in conformity with national law, it does not mean that the detention is not arbitrary under international law. All States must ensure that their domestic legislation duly and fully reflects the obligations stemming from international law.

65. The Working Group notes the numerous findings by the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[11] The Working Group also notes that the effect of the decision of the High Court of Australia in the case of *Al-Kateb v. Godwin* is such that non-citizens have no effective remedy against their continued administrative detention.

66. The Working Group specifically notes the decision of the Human Rights Committee in paragraph 9.3 of *F.J. et al. v. Australia*. In that case, the Committee examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment is such that there is no effective remedy to challenge the legality of continued administrative detention.

67. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[12] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation is discriminatory and contrary to articles 16 and 26 of the Covenant. It therefore concludes that the detention of Mr. Yekrop is arbitrary, falling under category V.

68. The Working Group is deeply concerned that Mr. Yekrop has been in detention for four years now. The Government itself acknowledges that he is not eligible for any other type of visa, and he thus faces the real prospect of indefinite detention given that the only

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(CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

[10] See A/HRC/13/30, para. 59. See also E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 68 (e); A/HRC/27/48/Add.2, para. 124; A/HRC/30/36/Add.1, para. 81; and opinion No. 72/2017.

[11] See *C. v. Australia*; *Baban and Baban v. Australia*; *Shafiq v. Australia*; *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004); *Bakhtiyari et al. v. Australia*; *D and E and their two children v. Australia*; *Nasir v. Australia*; and *F.J. et al. v. Australia*.

[12] See opinions No. 28/2017, No. 42/2017, No. 71/2017 and No. 21/2018.

other possibility for him currently is deportation, which is likely to engage the responsibility of Australia under the prohibition against refoulement.

69. The Working Group has repeatedly pointed out that detention of asylum seekers must never be unlimited or of excessive length, that a maximum period should be imperatively provided by law and that indefinite detention is arbitrary.[13] The Working Group once again emphasizes that just because a detention is carried out in conformity with national law, it does not mean that the detention is not arbitrary under international law. All States must ensure that their domestic legislation duly and fully reflects the obligations stemming from international law.

70. Lastly, the Working Group notes with concern that the present case is among several cases concerning immigration detention in Australia that have come before it during the past year.[14] All of those cases address the mandatory immigration detention policy and, in all cases, the Working Group has found the detention to be arbitrary.

Disposition

71. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of William Yekrop, being in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights and articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories IV and V.

72. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Yekrop without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

73. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Yekrop immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

74. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Yekrop and to take appropriate measures against those responsible for the violation of his rights.

Follow-up procedure

75. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Yekrop has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Yekrop;

(c) Whether an investigation has been conducted into the violation of Mr. Yekrop's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Australia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

76. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and

[13] See opinions No. 5/2009, No. 42/2017 and No. 71/2017; revised deliberation No. 5, paras. 25–26; and A/HRC/13/30, para. 61.

[14] See opinions No. 21/2018, No. 71/2017, No. 42/2017 and No. 28/2017.

whether further technical assistance is required, for example, through a visit by the Working Group.

77. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

78. The Government should disseminate through all available means the present opinion among all stakeholders.

79. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[15]

[*Adopted on 20 April 2018*]

[15] See Human Rights Council resolution 33/30, paras. 3 and 7.